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In The Supreme Court Of The United States

STATE OF ILLINOIS,
Petitioner,

v.

ROBERT S. LIDSTER,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF OHIO AND 22 OTHER STATES AND TERRITORIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Ohio and 22 other States and Territories (the "States") urge the Court to reverse the decision of the Illinois Supreme Court. As guardians of public order within their respective jurisdictions, the States share with Illinois an obvious interest in the question presented. The States advocate a narrow proposition: that police officers should be able to make limited use of checkpoints as an investigative tool when, in the context of a particular, pending criminal investigation, there are specific reasons to think that a checkpoint will uncover valuable information.

Just as important to our submission is what the States do *not* seek. The States acknowledge the propriety of, and in no way seek relief from, judicial review of the reasonableness of any given investigative checkpoint in a suppression hearing. Because an investigative checkpoint does not constitute a "stop[ ] justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime," *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000), the requirement of individualized suspicion should not prohibit such checkpoints. But it is also true that the type of investigative, informational checkpoint that the States propose here is an "exception to the usual rule of individualized suspicion" in a context where the government interest does involve "crime control," 531 U.S. at 42-43. The Court in *Edmond* expressed its concern that, if the broader social purposes served by specific law enforcement activity justified checkpoints, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 531 U.S. at 42.

The modest proposition the States urge in this case simultaneously vindicates the legitimate government interest in criminal investigation while safeguarding the individual's interest in not suffering an excessive burden of checkpoint

stops. It does so by placing the burden on the government to articulate specific reasons why a given checkpoint is likely to lead to the discovery of information that will advance a particular pending investigation.

The specific test we advocate is this: an informational checkpoint is valid when (1) the checkpoint imposes only brief, minimally intrusive stops designed to permit officers to impart information and ask one or two general questions (which motorists may decline to answer); (2) the police are able to articulate reasons particular to the investigation why such a checkpoint is likely to uncover important information; and (3) the checkpoint in all other respects conforms to the standards set forth in *Brown v. Texas*, 443 U.S. 47 (1979). The States respectfully submit that this approach serves the legitimate interest in informational contact between officers and citizens in the context of criminal investigations while affording sufficient protection to the individual motorist's liberty.

ARGUMENT

A. Under *Edmond*, the reasonableness of checkpoint stops should be determined by examining a checkpoint's primary, programmatic purpose.

In *Edmond*, the Court reviewed its Fourth Amendment cases and articulated the concept to be used in determining what reasonableness standard should be applied to a particular search or seizure. Under *Edmond*, reasonableness is determined in accordance with the "primary, programmatic purpose" of the scheme under which the suspicionless search or seizure is conducted.

The direct holding of *Edmond* rejects checkpoint stops "that are justified only by the ever present possibility that interrogation and inspection may reveal that any given motorist has commited some crime," 531 U.S. at 44, and characterizes such checkpoints as animated by a "primary purpose" that is "indistinguishable from the general interest in crime control," *id.* at 48. In other words, where the general interest in crime control constitutes the primary, programmatic purpose behind the checkpoint, individualized suspicion is required, and as a result the checkpoint approach of stopping all motorists for no reason (other than that they pass through the checkpoint) violates the Fourth Amendment. As *Edmond* also notes, the existence of probable cause typically obviates any further inquiry into purposes and subjective intentions of officers. *Id.* at 45, citing *Whren v. United States*, 517 U.S. 806, 813 (1996). ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Beyond cases where individualized suspicion is required—such as *Edmond* itself—lie those cases that consider seizures and searches based upon "the balance between the public interest and the individual's right to

personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (disallowing roving patrol stops to find illegal aliens); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976) (weighing "public interest against Fourth Amendment interest of the individual" validated certain checkpoints to find illegal aliens near border); *accord Chandler v. Miller*, 520 U.S. 305, 314 (1997) (suspicionless search required "context-specific inquiry, examining closely the competing private and public interests advanced by the parties"). *Edmond* acknowledges that the "cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." 531 U.S. at 46.

The balancing process has typically involved defining the public interest in terms of the purpose of the search, viewed from the programmatic level rather than the subjective intentions of particular officers. The States assert that the balance favors permitting the type of checkpoint at issue in this case.

B. The States often have a substantial interest in initiating informational contact with motorists and passengers, and that interest weighs strongly when measured against the minimal intrusion of a brief checkpoint stop.

The Court has long recognized the affirmative value of informational contact between officers and citizens outside the formal context of detention and interrogation. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34 (1966) (White, J., concurring). The "interrogation of witnesses and suspects" is "undoubtedly an essential tool in effective law enforcement." *Haynes v. Washington*, 373 U.S. 503, 515 (1963); *Schneckloth v.*

Bustamonte, 412 U.S. 218, 225 (1973) (same). Accordingly, the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), endorsed the police practice of "seek[ing] out evidence in the field to be used at trial against" a criminal defendant, opining that "[s]uch investigation may include inquiry of persons not under restraint" and "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." 384 U.S. at 477-78. Giving officers the information they request constitutes an "act of responsible citizenship." *Id.*

Where officers contact pedestrians or bus riders, "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 122 S.Ct. 2105, 2110 (2002), citing *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion by Justice White, joined by Marshall, Powell, Stevens, JJ.); *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); *see also United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (opinion per Stewart, J., joined by Rehnquist, J.) ("The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals' [internal citation omitted].").

In *Drayton* and similar cases, officers could initiate contact without coercive action. *See Drayton*, 122 S.Ct. at 2110 ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means."), citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). By contrast, highway safety does not permit such an *ad hoc* method of contacting drivers or their

passengers. Thus, where motorists are most likely to possess information relevant to an investigation, a brief stop becomes unavoidable—and stopping a motorist is typically found to constitute a Fourth Amendment "seizure," because it imposes a sufficient restraint to trigger Fourth Amendment scrutiny.

Previous decisions also define the degree of interest that can justify a checkpoint program. The cases that address searches and seizures without individualized suspicion find their respective places along a continuum in accordance with the significance of the intrusion on the private security interest of the individual. At one end of the spectrum lie the search cases. The Court has long held that searches, particularly of the home or of one's effects, constitute so deep an intrusion on the privacy and security interests safeguarded by the Fourth Amendment that "searches conducted outside the judicial process, without the prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Chimel v. California*, 395 U.S. 752, 758 (1969) ("It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrant wherever reasonably practicable.") (internal citation omitted). The warrant requirement for searches reflects the highly intrusive nature of officers' rummaging through one's home or effects.

As a result, the cases that consider searches unsupported by individualized suspicion typically pose the question in terms of what "special needs" are served by the search. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *see also Chandler v. Miller*, 520 U.S. 305, 314-15 (1997); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 663, 660-64 (1995); *Board of Independent School Dist. v. Earls*, 122 S.Ct. 2559, 2567-68 (2002). In certain instances, the government interest has been described as "compelling,"

Vernonia, 515 U.S. at 661, but the Fourth Amendment requires only that the quantum of government interest correlate to those "factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*

At the other end of the spectrum from intrusive searches lies the type of seizure at issue in this case. The Court has recognized the minimally intrusive nature of a brief traffic stop, calling it "slight," *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990), and noting that "[o]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence," *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). As distinct from roving patrols, checkpoints reassure the motorist who "see[s] that other vehicles are being stopped," witnesses "visible signs of the officers' authority," and accordingly becomes "much less likely to be frightened or annoyed by the intrusion." *Id.* at 558, citing *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975). Moreover, the Court has expressly distinguished the checkpoint situation as involving seizures that "deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection." *Martinez-Fuerte*, 428 U.S. at 561.

In this regard, the Illinois Supreme Court erred by relying in part on *Ferguson*, 532 U.S. 67 at 81 (2001). Pet. App. 5-6. *Ferguson* involved a requirement that hospital urine tests of mothers be routinely made available to police officers. The degree of intrusion caused by law-enforcement use of private medical information easily exceeds the intrusive effect of a brief highway stop on the privacy and security interest of a passing motorist.

Additionally, the circumstances of *Ferguson* are inapposite for the same reason that the *Edmond* scenario differs from that at issue here. Like the drug interdiction stops in *Edmond*, the urine test results in *Ferguson* were not obtained in a carefully tailored program that sought to advance a *particular*, pending criminal investigation. Instead, just like the situation in *Edmond*, police used the urine tests to identify which pregnant women might happen to be drug offenders.

In accordance with the minimal nature of the intrusion caused by a checkpoint, suspicionless checkpoint stops require only a "substantiality of the public interest" in their programmatic purpose, *Martinez-Fuerte*, 428 U.S. at 556; *accord, Sitz*, 496 U.S. at 451. The States contend here that the interest in initiating informational contact concerning a pending criminal investigation, when measured against the minimal nature of the intrusion, can justify checkpoints designed to further the purpose of obtaining such relevant information. Thus, the situation in this case did justify the informational, investigative checkpoint that was used here.

C. Where a checkpoint's primary, programmatic purpose is informational contact with citizens, reasonableness should be measured by examining the officers' particularized grounds for believing that the stops will lead to the discovery of information that is sought.

The States maintain that permitting informational checkpoints does not mean that checkpoints would "becom[e] a routine part of American life." 531 U.S. at 42. That is because evaluating informational stops, like the constitutional review of all seizures less intrusive than a traditional arrest, involves not only "weighing of the gravity of the public concerns served by the seizure" and "the severity of the interference with individual liberty," but also

"the degree to which the seizure advances the public interest." *Brown v. Texas*, 443 U.S. 47, 51 (1979). The required showing of this element cabins police discretion to conduct such checkpoints.

Determining the "degree to which the seizure advances the public interest" in this context involves assessing the particular reasons officers had to believe passing motorists might possess relevant information. In this case, Lidster was stopped at a checkpoint set up at the location of a fatal hit-and-run accident that had occurred one week before, at approximately the time the roadblock was set up. Pet. App. 2, 23. Officers intended to stop all eastbound traffic and hand out a flyer. Pet. App. 23. They specifically sought information about a Ford Bronco or large pickup truck implicated in the accident. The record also indicates the roadblock was "narrowly tailored" to connect with a potential witness "leaving a regular shift near the hit-and-run who may have seen something valuable." Pet. 2.

Also significant is the connection between the checkpoint in this case and roadway safety. Since some of the same motorists who were stopped might have passed by the same point at the time of the hit-skip accident, those persons might well have witnessed the event and possess valuable information. These circumstances both enhance the governmental interest and afford additional reason to believe the checkpoint would be successful.

Accordingly, this case presents the predicates that establish a sufficient "degree to which the seizure advances" the investigation. The checkpoint's time and location were conducive to contacting potential witnesses, and officers sought information about vehicles that passing motorists might have seen. The *Brown v. Texas* standards are met here.

D. Although exigent circumstances may justify a particular checkpoint, no exigency should be required to justify informational checkpoints generally, as long as officers articulate particularized reasons to believe that the stops will advance the pending investigation.

In *Edmond*, the Court acknowledged "circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control." 531 U.S. at 44. One such circumstance would involve efforts to "catch a dangerous criminal who is likely to flee by way of a particular route." *Id.* The Illinois Supreme Court read this passage as a justification for invalidating the checkpoint at issue here, because "there was no indication the motorist involved posed any further danger to local residents or, indeed, that the motorist remained in the vicinity," nor did police possess information that "the motorist was driving recklessly or was driving under the influence of alcohol." Pet. App. 9-10.

But this reasoning turns the logic of investigating crime on its head. The record in this case shows officers conducted checkpoint stops to identify the person or persons involved in the fatal hit-skip, and to discover the circumstances of the accident. The fact that officers did not know more about the case—who the motorist was, whether he may have appeared to be drunk or was driving erratically, whether he lived in the area or drove a Bronco with another state's plates—formed the basis for the need to find out more by asking persons who might know, *i.e.*, motorists who likely passed by at the same time and place the incident occurred.

While it is certainly true that particular exigencies can justify particular roadblocks, that should not mean that a checkpoint to find out basic information—including the dangerousness of the motorist and other factors showing

exigency—should be forbidden. It is often the very need for basic information, not the exigency, that justifies the minimal intrusion of a traffic stop.

E. Recognizing the validity of informational checkpoints raises no specter of pedestrian seizures, because pursuing the same investigative interest in the pedestrian context does not require seizure of a pedestrian.

As noted, highway safety dictates that officers cannot initiate informational contact with motorists without a stop that constitutes a Fourth Amendment seizure. Since the same safety needs do not apply when officers approach a pedestrian, it follows that the officer need not "seize" a pedestrian in order to hand out a flier or ask questions. The holding that the States ask for should make this point clear: the interest in informational contact justifies only the brief traffic stop necessary to hand out information or ask questions. Alone, that interest does not justify further detention, nor does that interest legitimate a stop not required by ordinary concerns of highway safety.

To illustrate the point, we hypothesize, instead of the roadblock in this case, two police officers handing out fliers and asking questions on a street corner at the same time and place as a hit-skip occurred one week before. One pedestrian stands at the street corner, wanting to cross but stopped by a red light. An officer approaches with a flier, tries to hand it to the pedestrian and also tries to ask a question or two. The pedestrian does not desire to cooperate, but does not want to walk away because she is waiting for the light to change. No Fourth Amendment seizure will occur so long as a reasonable person in the pedestrian's position would "feel free to terminate the encounter." *Drayton*, 122 S.Ct. at 2110.

To be sure, the pedestrian's movements may be confined by virtue of the red light, just as in *Drayton* a bus passenger "may not want to get off a bus if there is a risk it will depart before the opportunity to reboard." *Id.* at 2111. But as in *Drayton* that is the "natural result" of choosing to walk in a given direction; it "says nothing about whether the police conduct is coercive." *Id.*[1]

The hypothetical can be altered to introduce more or less coercive circumstances, but the point remains the same. Officers can pursue their interest in initiating informational contact with pedestrians without imposing any level of control that amounts to a Fourth Amendment seizure.

[1] Even the dissent in *Drayton* does not contest the proposition that the passenger's own travel plans alone do not constitute coercive conduct by officers. Instead, the *Drayton* dissent focuses on the multiple officers at the scene and the particular circumstance that the driver had collected all the tickets and then ceded control of the bus to officers, so that the officers assumed an additional authoritative role in that context. 122 S.Ct. at 2115-16.

CONCLUSION

For all the foregoing reasons, the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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